Nos. 18-1909, -1988

In the

United States Court of Appeals

for the Sixth Circuit

LOU'S TRANSPORT, INC., and T.K.M.S., INC.,
Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner

On Appeal from the National Labor Relations Board

BRIEF OF PETITIONERS CROSS-RESPONDENTS

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ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case Numbers: 18-1909, -1988

Case Name: *Lou's Transport, Inc., et al. v. National Labor Relations Board*

Name of Counsel: Amy D. Comito and Sandra L. Wright

Pursuant to 6th Cir. R. 26.1, Lou's Transport, Inc. and T.K.M.S., Inc. make the following disclosure:

I. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: No.

II. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest. No.

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Dated: November 5, 2018

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Oral argument may assist this Court in reaching a full understanding of the procedural posture and underlying facts of this litigation. Oral argument would also permit the attorneys for all parties to address any outstanding factual or legal issues which this Court deems relevant. Accordingly, Lou's Transport, Inc. and T.K.M.S., Inc. believe that oral argument is appropriate.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is predicated on §10(f) of the National Labor Relations Act, 29 U.S.C. §160. Lou's Transport, Inc. ("Lou's") and T.K.M.S., Inc. ("TKMS") (collectively referred to as "Petitioners/Cross Respondents") seek review of the July 24, 2018 Supplemental Decision and Order issued by the National Labor Relations Board (the "Board") and request that the Order be set aside.

On January 25, 2018, Administrative Law Judge Kimberly Sorg-Graves issued a Supplemental Decision. On July 24, 2018, the Board (via a three-member panel) issued a Decision and Order affirming ALJ Sorg-Graves' rulings, findings, and conclusions as modified by the Board, and the Board adopted the ALJ Sorg-Graves' recommended Order as modified by the Board.

The July 24, 2018 Board's Order being appealed is a final Order resolving all claims. On August 13, 2018, Petitioners/Cross Respondents filed a timely Petition for Review to this Court. Accordingly, this matter is properly before this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Board's July 24, 2018 Supplemental Decision and Order run contrary to the stated purpose of back pay awards when Hershey made more at his interim employment than he would have made if he was still employed with Lou's?

2. Did the Board and ALJ err in finding that the Compliance Specification used the correct back pay period when Hershey testified under oath that he did not want to return to work at Lou's and, therefore, an offer of reinstatement was futile[1]?

3. Did the Board and ALJ err in finding that the Compliance Specification used appropriate comparable employees to calculate back pay when the comparables used had more than a year of seniority over Hershey?

4. Did the Board and ALJ err in finding that the Compliance Specification used an appropriate wage rate to calculate back pay by automatically resolving an ambiguity in Hershey's favor and against Lou's despite evidence which did not warrant doing so?

5. Did the Board and ALJ err in finding that the Compliance Specification properly calculated overtime when mixed methodologies were used to calculate

[1] In referring to the "Compliance Specification," Petitioners mean the seventh (7th) version of the Compliance Specification that was made part of the record during the September 18, 2017 hearing in this matter. (Amended Fourth Amended Compliance Specification, GC1(qq); App. 1381-1440)

regular time and overtime and when there is no legal support for mixing methodologies?

6. Did the Board and ALJ err in upholding the Compliance Specification which did not deduct union dues, uniform fees, and unemployment benefit payments from the back pay liability figure when failing to do so ran contrary to the stated purpose of back pay?

7. Did the Board and ALJ err in finding that the Compliance Specification reasonably calculated interim expenses without offsetting interim earnings when the interim earnings should have been offset because Hershey made more at his interim employment than he would have earned at Lou's?

8. Did the Board and ALJ err in upholding the Compliance Specification which included specious 401(k) benefits in the total back pay liability and gave Hershey credit for contributions he did not make?

9. Did charging an Administrative Law Judge with making findings of facts and conclusions of law violate the United States Constitution and deprive Petitioners of an Article 3 judge or jury?

10. Did the Board and ALJ err in upholding the Compliance Specification that contained mixed methodologies of calculations and repeated errors which deprived Lou's of its due process and equal protection rights under the 5^{h} Amendment to the United States Constitution?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The National Labor Relations Board (the "Board") issued its original Compliance Specification on November 6, 2015. (Compliance Specification, GC 1(f)[2], App. 1294.) Petitioners Lou's Transport, Inc. and T.K.M.S., Inc. (hereafter "Lou's") filed an Answer to the Compliance Specification on November 19, 2015. (Answer, GC 1(j), App. 1276.) The Board issued its Amended Compliance Specification on June 27, 2016. (Amended Compliance Specification, GC 1(o), App. 1156.) Lou's filed an Answer to the Amended Compliance Specification on July 14, 2016. (Answer, GC 1(q), App. 1147.) Nearly 5 months later, the Board then issued its Second Amended Compliance Specification on December 8, 2016. (Second Amended Compliance Specification, GC 1(v), App. 1074.) Lou's filed an Answer to the Second Amended Compliance Specification on December 29, 2016. (Answer, GC 1(x), App. 1062.)

Nearly eight months passed before the Board issued its Third Amended Compliance Specification on August 3, 2017. (Third Amended Compliance Specification, GC 1(gg), App. 988.) The Third Amended Compliance

[2] All references to "GC" (followed by a number or number/letter combination) mean the exhibits offered by the General Counsel and admitted into evidence during the September 18, 2017 hearing in front of Administrative Law Judge Kimberly Sorg-Graves. All references to "R" (followed by a number) mean the exhibits offered by Petitioners and admitted into evidence during the September 18, 2017 hearing in front of Administrative Law Judge Kimberly Sorg-Graves.

Specification included a completely new element of damages related to Charging Party Michael Hershey's ("Hershey") 401(k), an element of damages which was never asserted in any of the prior versions of the Compliance Specification, and an element of damages asserted for the first time just over a month before the scheduled hearing date.

Because of this newly asserted element of damages, Lou's needed to gather additional information to assess, investigate and defend the new claim, which included having the Board issue Subpoenas that Lou's wanted issued, all before the hearing scheduled for September 18, 2017. As such, Lou's filed a motion requesting that the hearing date be adjourned and that Lou's be granted an extension of time in which to file its Answer to the Third Amended Compliance Specification. (Lou's Motion, App. 944.) Lou's Motion was filed on August 14, 2017 (*id*.) and on the same day, the Board issued its Fourth Amended Compliance Specification (GC 1(ii), App. 950.), just 11 days after filing its Third Amended Compliance Specification and before Lou's had the opportunity to obtain a ruling on its motion requesting an extension of time in which to answer the Board's Third Amended Compliance Specification and requesting that the hearing be rescheduled. Counsel for the General Counsel opposed Lou's motion. (Counsel's Opposition, App. 942.) The Board's Regional Director granted Lou's an additional three (3) days in which to file its Answer to the Fourth Amended

Compliance Specification, stating that there were "relatively minor amendments" to the Fourth Amended Compliance Specification. (Order, App. 941.) Lou's request to reschedule the September 18, 2017 hearing was forwarded to the Division of Judges for a ruling (*id.*), and that request was ultimately denied by the Chief Administrative Law Judge.[3] (Order, App. 20) Lou's filed an Answer to the Fourth Amended Compliance Specification on September 6, 2017. (Answer, GC 1(oo), App. 904.)

The matter proceeded to a compliance specification hearing on September 18, 2017 (the "Hearing"). At that time, General Counsel, on the record, noted mathematical errors in the Fourth Amended Compliance Specification, the errors being found after the document was filed but before the Hearing date. (TR. pp. 9-10, App. 734-735[4].) The Board did not have time to file a Fifth Amended Compliance Specification prior to the Hearing, so at the Hearing, General Counsel

[3] The two Orders, the one from the Board granting an extension for Lou's to file an Answer and the one from the Chief ALJ denying Lou's request to reschedule the hearing, address different compliance specifications, and that is why the Orders reference two different due dates. The Chief ALJ's Order states that the due date for Lou's to file an Answer was August 23, 2017. However, that was the due date for Lou's Answer to the Third Amended Compliance Specification. The Board's Order addresses the due date for Lou's Answer to the Fourth Amended Compliance Specification, and that due date was September 5, 2018, which was extended for only three days to September 8, 2017.

[4] All references to "TR" mean the transcript from the September 18, 2017 hearing in front of Administrative Law Judge Kimberly Sorg-Graves and included in Doc. 21-3, App. 725-898.

presented a "red-lined" version of the Fourth Amended Compliance Specification (which made the corrections to some math errors), and Administrative Law Judge Kimberly Sorg-Graves ("ALJ") ruled that the corrected document would be referenced as the Amended Fourth Amended Compliance Specification. (Amended Fourth Amended Compliance Specification, GC 1(qq), App. 1381; TR. pp. 9-13, App. 734-738.) During General Counsel's direct examination of the Board's Field Examiner at the Hearing, additional errors in the Amended Fourth Amended Compliance Specification were noted. Specifically, the Amended Fourth Amended Compliance Specification contained the incorrect Schedules D and E, and pages 52 and 53 were missing. As such, pages 11-60 of the Amended Fourth Amended Compliance Specification were replaced during the proceedings themselves, thereby revising the Amended Fourth Amended Compliance Specification yet again. (TR. pp. 38-40, App. 763-765.)

During the Hearing, the Board identified three elements of damages in Hershey's claim: (1) lost wages, (2) interim expenses (mileage), and (3) 401(k) losses. Both Lou's and the General Counsel presented testimony and documentary evidence to the ALJ, who issued her Supplemental Decision on January 25, 2018. (Supplemental Decision, App. 22.) Lou's filed Exceptions to the ALJ's January 25, 2018 Supplemental Decision on February 19, 2018. (Exceptions, App. 37.) General Counsel filed its Answering Brief on April 2, 2018. (Answering Brief,

App. 691.) The Board issued its Supplemental Decision and Order on July 24, 2018 (Supplemental Decision, App. 716), where the Board affirmed the ALJ's rulings, findings and conclusions, and adopted the recommended Order as modified. It is this Supplemental Decision and Order that Lou's now appeals, and a Petition for Review was filed by Lou's on August 13, 2018. (Doc. 1-2, App. 14.)

II. BACKGROUND FACTS

Hershey was hired by Lou's as a driver on July 26, 2012. (TR. pp. 121, 126, App. 846, 851.) In November of 2012, he voluntarily took a job working out of Lou's Flat Rock yard. (TR. pp. 122-123, App. 847-848.) Hershey drove a quad axle truck for Lou's (TR. p. 121, App. 846), and his wages were set by a Labor Agreement entered into between Lou's and the relevant union. (Labor Agreements, GC 6 and GC 7; *See* Schedule A, p. 25 in each Agreement, App. 1477, 1526.) Hershey's employment with Lou's was terminated on March 27, 2013 for putting obscene signs in his truck windows; at that time he was still working from the yard in Flat Rock (TR. p. 127, App. 852.). Almost immediately following his termination, Hershey found subsequent employment with various employers. (Hershey's Payroll Records, R3-R6, App. 1672-1758.) Hershey rejected an unconditional offer of reinstatement with Lou's on August 22, 2016. (Supplemental Decision, App. 25.) Hershey earned more money by working fewer hours at his interim employment than he would have earned if he stayed at Lou's.

(Doc. 24-1, App. 535-558) Hershey also had to drive fewer miles to/from his interim employment than he did when he worked for Lou's. (TR. pp. 98-99, 102 App. 823-824, 827.)

SUMMARY OF THE ARGUMENT

Hershey made more money at his interim employment than he would have made if he stayed employed at Lou's, and he did so working fewer hours. Simply put, he sustained no damages. Regardless of these proven facts, the Board spent more than two years trying to come up with a version of a Compliance Specification which would result in a monetary award to Hershey, and the ALJ allowed the Board to do so by affirming its errors and unsupported calculations.

The purpose of back pay awards is to make an employee whole – to put Hershey in the same position he would have been but for his termination. Despite this stated purpose, the Board and ALJ punished Lou's for the finding of the unlawful labor practice and gave Hershey a financial windfall. From the beginning of the back pay period to the end of the back pay period, Hershey came out financially ahead by working for his interim employers, and he did so working fewer hours. Hershey suffered no damages, but the Board and the ALJ acted contrary to the law regarding the purpose of back pay and awarded Hershey over $49,000.00 for damages he never suffered.

The Board and the ALJ further erred in allowing the back pay period to extend beyond November 24, 2014. Hershey was terminated on March 27, 2013. While giving testimony under oath in front of another ALJ during the unfair labor practice hearing on November 24, 2014, Hershey stated that he did not want to

return to work for Lou's. As such, an offer of reinstatement was futile and the back pay period should have ended as of that date.

Further error occurred when the Board and ALJ used inappropriate comparable employees in the Compliance Specification calculations. Instead of using drivers who were hired near the same time as Hershey to avoid issues with seniority and pay rate differences, the Board and the ALJ used employees who were hired more than a year before Hershey. The year difference in seniority put the Board's comparables in a different classification than Hershey for purposes of their pay increases.

An incorrect wage rate was also used by the Board in its Compliance Specification. The Board and ALJ applied a wage rate which favored Hershey – they gave Hershey an increase in his wage rate which was not supported by the testimony and evidence presented by Lou's at the Hearing. This error was compounded when the Board and ALJ failed to use the wage increase Hershey would have earned pursuant to the union contract. Moreover, the Board and ALJ failed to use the correct wage rate from Hershey's interim employment. Instead of using Hershey's actual pay, which was made available to the Board during the preparation of the Compliance Specifications, the Board and ALJ used an estimate or average of Hershey's interim employment pay.

Overtime pay was also calculated improperly by the Board and affirmed by the ALJ. While the Board and ALJ used quarterly calculations for regular time, they calculated overtime pay on a weekly basis, and this allowed the Board and ALJ to manipulate Hershey's pay to create an award of back pay. The Board and ALJ did so, however, with no legal support for their use of the mixed methodologies and, moreover, they did so in spite of the fact that all Board decisions and case law which address any issues related to back pay calculations reference ***quarterly*** calculations, not ***weekly*** calculations. No Board decision or case law applies a mixed methodology. The Board and the ALJ mixed the methodologies because doing otherwise would not create an award of back pay.

Neither union dues, uniform fees, nor unemployment benefit payments were deducted from the back pay liability figure by the Board or ALJ. Because the stated purpose of back pay is to make the employee whole, those items should have been deducted in accordance with the stated purpose. However, the Board and ALJ chose to ignore the stated purpose of back pay and to exclude those deductions.

Because Hershey made more money at his interim employment than he would have earned at Lou's, he is not entitled to mileage. The Board and ALJ, however, wanted to include mileage as an interim expense, so they took a recent Board decision which does not apply and shoe-horned this matter into it.

At the 11th hour, the Board added a new element of damages to its back pay award – alleged 401(k) damages. Despite the fact that the inclusion of 401(k) damages was premised on pure speculation, the ALJ allowed and affirmed the inclusion of $11,513 in damages for 401(k) contributions – contributions that Hershey could not have made even if he had stayed at Lou's. Aside from the prejudice to Lou's created by adding an entirely new element of damages just a month before the Hearing, damages which comprise almost 25% of the total damage claim, the Chief ALJ further prejudiced Lou's by denying its motion to adjourn the Hearing for one month to allow Lou's additional time to investigate and assess the claim and prepare its defense to the new claim.

Lastly, the Board and ALJ's calculations, findings and decisions violate several of Lou's constitutional rights. Lou's was denied the benefit of an Article 3 judge or jury when the ALJ was permitted to make findings of facts and conclusions of law. Additionally, Lou's was deprived of its right to due process under the 5th Amendment to the United States Constitution, as Lou's was denied proper notice and a decision by a neutral decision-maker. Lou's was also denied equal protection under the law. Lou's was treated differently by the Board and ALJ, for the sole purpose of punishing Lou's, when the Board and ALJ used mixed methodologies in making some of its calculations. The only reason for mixing the methodologies was to create an award of back pay that was not justified because

Hershey suffered no damages. Treating Lou's differently in mixing the methodologies for this purpose deprived Lou's of equal protection under the law.

For all these reasons, the Board and ALJ's back pay award of $49, 817 is not supported by the facts or the law, and the Order awarding back pay should be vacated.

ARGUMENT

I. INTRODUCTION

Hershey made more money at his interim employment than he would have made if he stayed employed at Lou's, and he did so working fewer hours. This is a proven fact. Despite this proven fact, and even though the purpose of back pay is to make whole, as opposed to being punitive, the Board and the ALJ contend that Hershey is entitled to back pay, and the Board and the ALJ worked together affirming each other's errors and methods which created such an award. Moreover, the Board spent over two years' worth of time and expense correcting its own repeated errors in its back pay calculations (errors found and pointed out by counsel for Lou's) while still trying to create a scenario where Hershey would be awarded back pay even though neither the facts nor the law warranted such an award.

Hershey sustained no damages as a result of his termination from Lou's. In fact, he was better off financially NOT working for Lou's. The underlying unfair labor practice charges were previously adjudicated. The fact that it was found that Lou's unlawfully terminated Hershey's employment for putting obscene signs in his truck windows does not equate to an automatic finding and award of back pay damages. The Board and the ALJ, however, took the position that an award of

back pay needed to be the end result, and they did what was necessary to achieve that result, even though the result is contradicted by the facts, law and evidence.

II. STANDARD OF REVIEW

The standard of review for reviewing a Board decision has been explained as follows:

> The appropriate standard of review is set out in *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363 (6th Cir. 1993):
>
> > We sustain the Board's findings of fact only so long as they are supported by substantial evidence on the record viewed as a whole.... We also review the Board's application of the law to particular facts under the substantial evidence standard.... [Substantial evidence] means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.... We review the Board's conclusions of law *de novo*. ... If the Board errs in determining the proper legal standard, we may refuse enforcement on the grounds that the order has no reasonable basis in law.
>
> *Pentre Elec.*, 998 F.2d at 368 (citations and internal quotations omitted). We examine the entire record to determine whether substantial evidence supports the Board's decision, and whether its conclusion is supported by law.

NLRB v. Good Shepherd Home, Inc., 145 F.3d 814, 816 (6th Cir. 1998).

III. THE BOARD'S SUPPLEMENTAL DECISION RUNS CONTRARY TO THE STATED PURPOSE OF BACK PAY AWARDS.

The general purpose of back pay awards is "to restore the employee to the status quo he would have enjoyed if the discriminatory discharge had not taken place." *See McCann Steel Co., Inc. v. NLRB*, 570 F.2d 652, 656 (6th Cir. 1978). "The goal of a make-whole award is to put the employee in the same position that she would have been in had her employer not engaged in the unlawful conduct." *See Ricco v. Potter*, 377 F.3d 599, 605 (6th Cir. 2004). Keeping this statement of the law in mind, any award of back pay to Hershey runs contrary to the law because Hershey made more money at his interim employment than he would have made if he were employed by Lou's, and he did so while working 1,130 fewer hours. (TR. pp. 72-73, App. 797-798; Doc. 24-1, App. 535.)

To award Hershey back pay in this scenario is not "make whole," but rather, is a windfall to Hershey, and the Board's policy in not only allowing such a windfall, but actually creating the windfall, appears more punitive in nature than compensatory. This windfall was purposely created by the Board through multiple errors in its calculations. No matter how this claim is analyzed, the bottom line remains the same: Hershey was better off financially with his interim employment than he would have been if he had not been terminated by Lou's. Under the law, therefore, Hershey is not entitled to back pay or mileage.

IV. THE BOARD AND ALJ ERRED IN FINDING THAT THE COMPLIANCE SPECIFICATION USED THE CORRECT BACK PAY PERIOD.

In the Compliance Specification, the back pay period ran from March 27, 2013 through August 22, 2016. The Board rejected Lou's position that back pay should be cut off as of November 2014, when Hershey testified under oath that he did not want to be reinstated. In rejecting Lou's position, the Board found that Lou's question to Hershey concerning his desire for reinstatement during the unfair labor practice hearing did not meet the standards required in making an unconditional offer of reinstatement. This finding misses the point. During the September 18, 2017 Hearing, Hershey confirmed the testimony he gave on November 24, 2014, that he did not want to be reinstated at Lou's. (TR. p. 137, App. 862.) On cross examination, General Counsel got Hershey to testify that he was not presented with an offer of reinstatement in November 2014. However, given Hershey's sworn testimony on November 24, 2014 in front of an ALJ that he did not want to be reinstated, it would have been futile for Lou's to make him an offer of reinstatement. If making an offer would have been an exercise in futility, then back pay should have been tolled as of November 24, 2014.

V. THE BOARD AND ALJ ERRED IN FINDING THAT THE COMPLIANCE SPECIFICATION USED APPROPRIATE COMPARABLE EMPLOYEES TO CALCULATE BACK PAY.

The ALJ and the Board used improper comparable employees to calculate Hershey's back pay. Kevin Moore, Sr. ("Moore") was the most reasonable comparable to calculate Hershey's back pay. Moore, like Hershey, was a quad axle driver at Lou's, putting Moore and Hershey in the same classification for purposes of their pay increases under their union agreement. Also, Moore was hired in May 2012, less than two months before Hershey's hire date.

However, General Counsel used Ronnie Smith and Gary Forsyth as comparables, even though they had hire dates of April and May 2011, giving them more than one year of seniority over Hershey. At the Hearing, the Board's compliance officer testified that he did not use Moore as a comparable because there were unexplained gaps in Moore's employment. General Counsel argued that despite requests for documents from Lou's in April to June 2017 which may have explained the gaps, Lou's failed to provide anything. As such, the ALJ decided that if any ambiguities remained about the reasoning for the comparables' lay-offs due to the lack of requested documents, then the doubts or ambiguities should be resolved in Hershey's favor as the wronged party. The result was that that Ronnie Smith and Gary Forsyth were found to be comparable employees for purposes of calculating back pay.

This ruling ignores the substantial evidence and testimony from the Hearing. Indeed, the Board's own Field Examiner, Daniel Molenda, testified that his calculations assumed Hershey would make the same amount as Moore because they were in the same class. (TR. p. 90, App. 815.) As acknowledged by the Board, Moore did not work during the first quarters of 2014 and 2016 (GC 1(v), App. 1074; *see* Schedule E, App. 1104, 1106). Molenda testified during the Hearing that Moore was not used as a comparable because of those gaps in his employment. Those gaps, however, prove Lou's point – the Board presented no evidence to show that Hershey, a driver with less seniority than Moore, would have worked during those times, either.[5]

Given the above, the total back pay and expenses in the first quarters of 2014 and 2016 using Moore as a comparable should be $0, as they were in the Board's Second Amended Compliance Specification (*id.*), and Hershey's corresponding back pay and expenses for those two quarters should be $0. However, because these facts were unfavorable to Hershey and the Board's resulting calculations, the Board refused to use the most appropriate comparable (Moore).

The comparables used by the Board, Ronnie Smith and Gary Forsyth, had more than a year of seniority over Hershey. Having more than one year's

[5] One of the Board's comparables, Forsyth, had a gap in employment as a driver when he worked dispatch. However, during those gap periods, the Board simply did not use Forsyth. Therefore, the existence of any gaps should not have been an issue with Moore.

seniority, the Board acknowledged that their pay rates would be higher than Hershey's, as the wage rates were set by union contract that called for a yearly increase. (GC 1(ii), App. 961-966.)

The ALJ and the Board's ruling on this issue also ignores the fact that the Board started calculating back pay in early 2015, after the underlying unfair labor practice hearing and well before the issuance of the first compliance specification. More than two years later, the Board was still requesting documents from Lou's and still trying to get its calculations correct. The Board and General Counsel, throughout more than two years, continuously requested various documents, information and records from Lou's, and Lou's worked diligently to provide what was requested.

At some point, however, the Board simply had to live with its erroneous calculations, allow the matter to proceed to hearing, and give Lou's the opportunity to prepare for the hearing without the fear of yet another new compliance specification. Every time Lou's provided the Board and General Counsel with documents or information, the compliance specification was revised, one time adding an entirely new element of damages. Each time, Lou's had to incur the time and expense of preparing and filing another answer, and on several occasions, the compliance specification hearing had to be adjourned. Lou's is aware of no rule, law, or regulation which permits the Board to amend its compliance

specification an unlimited number of times, request documents from petitioners over as long a period as it wants, and postpone the hearing requested by petitioners for as long as it wants. At some point, fairness and justice come into play. The Board had to be held be accountable for its inability to prepare an accurate compliance specification, and the continuous changes and delays had to end. However, the ALJ and the Board never considered the General Counsel and Board's own delay and unfairness in their decisions.

VI. THE BOARD AND ALJ ERRED IN FINDING THAT THE COMPLIANCE SPECIFICATION USED AN APPROPRIATE WAGE RATE TO CALCULATE BACK PAY.

The Compliance Specification used an incorrect wage rate to calculate Hershey's back pay. In upholding this wage rate, the ALJ and the Board found that an ambiguity in the record would be automatically decided in Hershey's favor and against Lou's. The purported ambiguity stemmed from a periodic wage variation for the Board's comparable, Ronnie Smith, who sometimes received $2 or more per hour than what his labor agreement wage rate called for.

The Compliance Specification was prepared based upon an assumption that the variance was due to prevailing wage jobs during the times of increase and that Hershey would have received the same increase. (TR. pp. 80-81, 86-87, App. 805-806, 811-812.) But this assumption was not supported by any documentary evidence at the Hearing. Further, the assumption was disputed by Dave Laming's

testimony that Lou's had no prevailing wage jobs during that time period for which Lou's drivers were paid prevailing wages. Instead, Laming testified that Ronnie Smith earned a $2 per hour premium during a given pay period when he trained other new drivers. (TR. pp. 146-147, App. 871-872.) Incredibly, the ALJ found that Laming's testimony did not clear up the ambiguity because Laming testified that the $2 increase was a premium paid to Ronnie Smith for training new drivers, yet Ronnie Smith's increase was sometimes more than the $2 premium that Laming testified about.

Moreover, according to the Supplemental Decision, Lou's provided no evidence that Hershey, who had 35 years of driving experience, would not have been eligible for the $2 training premium or other increases in wages above the contractual wage rate that Ronnie Smith enjoyed. This finding ignores other substantial evidence presented at the Hearing. First, it overlooks Hershey's own testimony where he admitted that he had no evidence to dispute Laming's testimony that Ronnie Smith was paid $2 extra for training other drivers. (TR. pp. 159-160, App. 884-885.) Secondly, the finding disregards the fact that Hershey had only been with Lou's for eight (8) months at the time of his termination. Hershey was a new driver with respect to his employment with Lou's, so it is logical and reasonable that Ronnie Smith, who had more than a year of seniority

over Hershey, would be asked and paid to train new drivers but that Hershey would not.

While the Board suggested in its Fourth Amended Compliance Specification (GC 1(ii), App. 950) that it used the rates Hershey would have made if he still had been employed by Lou's, it did not actually use those rates. (*See* GC 1(ii), page 2, paragraph 5, App. 951.) The hourly rate that Hershey would have earned pursuant to the union contracts is as follows:

3/30/13 - 7/06/13 $13.30 (1-year rate under old contract)
7/13/13 - 3/15/14 $14.01 (2-year rate under old contract)

*Note: The new union contract went into effect after the 3/5/14 payroll

3/22/14 - 6/28/14 $15.75 (remainder of 2nd year under new contract)
7/05/14 - 6/27/15 $16.25 (3rd year)
7/04/15 - 6/25/16 $16.75 (4th year)
7/02/16 - 8/20/16 $17.25 (5th year)

(*See* GC 6 and GC 7, App. 1477 and 1526.) The Board admitted at the Hearing that the three spreadsheets prepared by Lou's (attached to Petitioners' Answer to the Fourth Amended Compliance Specification) were all correct, used all the correct wage rates and payroll hours, and noted all changes in YELLOW.[6] (TR. pp. 68-73, App. 793-798.) Indeed, Molenda admitted that he found no errors in

[6] The highlighted version of the spreadsheets is in color and easier to read in the exhibits attached to Petitioners' Exceptions to Administrative Law Judge's January 25, 2018 Supplemental Decision (Doc. 21-4, App. 37), so Petitioners will reference the spreadsheets from that document throughout the remainder of the brief.

Lou's spreadsheets. (TR. p. 77, App. 802.) These three spreadsheets were admitted into evidence during the Hearing.

In addition, the Compliance Specification did not use the correct wage rate from Hershey's interim employment.[7] In preparing its Compliance Specifications, the Board failed to use Hershey's actual pay from his interim employment, although the Board had all the information available to do so.[8] Instead, the Board used an estimate or average of Hershey's interim employment pay. Lou's highlighted these errors in the spreadsheets attached to Petitioners' Answer to the Fourth Amended Compliance Specification and referenced during the Hearing. (The highlights can be noted in Doc. 21-4, App. 535-542, 543-550 & 551-558.)

VII. THE BOARD AND ALJ ERRED IN FINDING THAT THE COMPLIANCE SPECIFICATION PROPERLY CALCULATED OVERTIME.

The Compliance Specification improperly calculated overtime pay, using a weekly basis instead of the quarterly basis used to calculate regular pay. Essentially, the ALJ decided that the Board had carte blanche to calculate overtime

[7] Lou's made this argument in Petitioners' Post Hearing Brief filed on November 6, 2017, following the Hearing. However, ALJ Sorg-Graves did not address this argument in her Supplemental Decision.

[8] The Board was provided with Hershey's payroll records from Hershey's interim employers, including Kraken (R3, App. 1672), Calo & Sons (R4, App. 1677), Tia Marie (R6, App. 1752), and Road Commission of Oakland County (R5, App. 1727).

however it wanted. However, as shown in the spreadsheets comprising Doc. 21-4, App. 535-558, Hershey made more money at his interim employment by working fewer hours than he would have made if he were still employed by Lou's. He sustained no monetary damages. The Board, however, tried to find a way around this obvious conclusion. Its solution was to use a quarterly methodology to calculate back pay and a weekly methodology to calculate overtime. The ALJ permitted the Board to use this odd calculation, and the Board subsequently agreed with its own decision to do so.

So even though the Board calculated every other element of damages on a quarterly basis, it calculated overtime on a weekly basis. It had no legal justification to use inconsistent methodologies. As a result, the Board improperly distributed overtime hours. Essentially, the Board took Hershey's available overtime hours and split them in half; one-half was added to week one in a bi-weekly pay period and one-half was added to week two in the bi-weekly pay period.

An example best illustrates the Board's error. Assume that the Board's comparables worked 40 hours of overtime during a two-week pay period. The Board's calculations took the 40 hours of the comparables' overtime and assigned 20 hours to week one of the pay period and 20 hours to week two. The Board did so without knowing how those 40 hours of overtime were actually distributed. It

may have been the case that 10 of the overtime hours were worked during the first week of the pay period and the other 30 overtime hours were worked during the second week of the pay period. The Board did not know the correct allocation – it assumed or guessed – and the Board never bothered to ask for timesheet records which would have shown exactly how the overtime was allocated during the pay period. The Board's Field Examiner, Molenda, acknowledged this inconsistent methodology and overtime guesswork during the Hearing. (TR. pp. 62-63; 75-76, App. 787-788; 800-801.)

The problem with the Board's assumptions is that when they are applied to a quarterly back pay calculation, they create calculations to Lou's detriment and Hershey's advantage. Using the example above, assume Hershey also worked 40 hours of overtime at his interim employment during the same pay period as the comparables, but his overtime hours were worked in the opposite manner as the comparables (i.e., Hershey worked 30 overtime hours during the first week of the pay period and 10 hours of overtime during the second week). In that situation, using the Board's methodology, during week one of the pay period (when comparables worked 10 hours of overtime and Hershey worked 30), Lou's was given no credit for the 20 extra hours of overtime Hershey was able to work at his interim employment during that first week. During week two, however, when the comparables had 30 hours of overtime and Hershey only had 10 at his interim

employment, Hershey was essentially given a credit (and Lou's was penalized) for the 20 hours of overtime that he "lost" during the second week. Although in the example both sides worked 40 hours of overtime, Hershey received a windfall calculation for that pay period because the Board looked at the overtime on a weekly basis instead of a quarterly basis, and because the Board simply took the overtime hours and split them in half during each two-week pay period. Such a result makes no sense, and the inconsistent methodology is illogical and unfair to Lou's.

The ALJ's Supplemental Decision attempted to explain why this guesswork was allowed in calculating overtime. The Supplemental Decision stated that Lou's provided the Board with biweekly payroll information for the comparable employees, which gave total regular hours and overtime hours for each two-week payroll period, but that Lou's did not provide time cards or other information from which the Board could have derived the accurate regular and overtime hours to attribute to each week. However, the Board never requested such documents from Lou's, nor did the Board indicate that it was willing to change its methodology if Lou's provided such documents or records. The ALJ's Supplemental Decision suggested that the Board had no other information from which to work, so it made the best of what it had. That is not the case at all. The Board did not request any additional information regarding overtime, apparently because it had no intention

of using the information as it knew that it would change the calculations in a way that was detrimental to Hershey and beneficial to Lou's.

Oddly, the ALJ and the Board drew a negative inference against Lou's when Lou's did not provide certain information requested by the Board during its multiple attempts at preparing an accurate Compliance Specification. However, no negative inference was drawn against the Board when it failed or refused to request helpful and relevant information from Lou's which the Board knew could provide a more accurate allocation of the comparables' overtime hours. The Board could purposely exclude information regarding the allocation of overtime hours for the comparables without suffering any negative consequences, but Lou's had negative consequences whenever it did not provide information that was requested. This is certainly an unfair double standard.

The Board mixed its methodologies because calculating overtime on a quarterly basis would not have resulted in favorable calculations for Hershey. Using the Board's computations, applying Hershey's actual wages (discussed above) and correcting the overtime calculation to a quarterly basis instead of weekly, the calculation for net back pay only would be -$2,224.77 because Hershey actually made more money at his interim employment. (*See* Spreadsheet #1, p. 1, Doc. 21-4, App. 535.) Indeed, the Supplemental Decision which discusses the overtime calculation issue, and the Board precedent relied upon by

the ALJ, support Lou's point. On page 7 of the Supplemental Decision (Doc. 21-4, App. 28), the ALJ discussed Lou's objection to the week-by-week comparison and Lou's contention that the overtime portion of the back pay liability should be calculated on a quarterly basis just as the regular hours were computed in the Compliance Specification. In doing so, the ALJ stated that Lou's own calculations show five quarters during which Hershey's total interim earnings were less than the back pay liability for those quarters. The ALJ went on to say that Lou's calculations ignore long-standing Board precedent that interim earnings that exceed gross back pay in any quarter (not any week) are not applied against gross back pay in any other quarter (not any other week). (*See* January 25, 2018 Supplemental Decision, p. 7, lines 20-24, emphasis added, App. 28.) As the ALJ acknowledged in her reasoning, long-standing Board precedent makes calculations on a quarterly basis (not a weekly basis).

The Supplemental Decision further stated that the difference in quarterly gross back pay sums was the result of the Compliance Specification's weekly comparison of overtime hours, and that the Board and General Counsel relied upon the Board's Compliance Manual. Quoting a portion of the Manual, the ALJ's Supplemental Decision stated:

> In cases where a discriminate worked substantially more hours for an interim employer than he or she would have worked for the gross employer, only interim earnings based on the same number of hours as would have been

> available at the gross employer should be offset against gross back pay.

(*See* 1/25/18 Supplemental Decision, p. 7, lines 35-38, App. 28.)

However, such reasoning is not applicable here, as Hershey did not work substantially more hours for his interim employer than he would have worked for Lou's. Hershey worked fewer hours for his interim employer but earned more money. So, he lost no earnings. Furthermore, nothing in this quoted portion of the Manual suggests that the Board can use whatever methodologies it wants to achieve the highest result for the discriminate. The statement/standard from the Compliance Manual only works in Hershey's favor if overtime is calculated weekly instead of quarterly, which is why the Board mixed the two methodologies. The Board's error in the Compliance Specification does not stem from the fact that it included overtime in its interim earnings and gross back pay calculations – its error was in calculating overtime in a (weekly) manner inconsistent with the regular time (quarterly) calculations to create a windfall for Hershey.

In the Supplemental Decision, the ALJ relied upon *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989), where "the Board held that a 'backpay claimant who chooses to do the extra work and earn the added income made available on the interim job' may not be penalized by having those extra earnings deducted from the gross backpay owed by the Respondent." (*See* 1/25/18 Supplemental Decision, pp. 7-8, App. 28-29.) Here, however, the Board not only

gave credit to Hershey on a weekly basis when he worked more overtime at his interim employment (by allowing Hershey to "keep" those amounts and not deduct those amounts), but the Board also penalized Lou's on a weekly basis when Hershey missed out on overtime that would have been available if he were still at Lou's. Essentially, Hershey is being allowed to double-dip.

The ALJ's Supplemental Decision cited other Board decisions that discussed the proposition that overtime hours worked by a claimant that exceeded those hours the claimant would have worked at the respondent employer should not be deducted as interim earnings. If the overtime hours were fairly calculated in the same (quarterly) manner as regular time calculations, that might lead to a reasonable outcome. However, calculating overtime hours on a weekly basis, while calculating regular hours on a quarterly basis, solely to create the situation addressed by these prior Board decisions, is not even suggested by any Board decision. It is unreasonable and fundamentally unfair to manipulate the calculations so that the Board can achieve its desired result (i.e., interim earnings that do not have to be deducted from gross back pay). Neither the Board, General Counsel, nor ALJ cited to a single case where a compliance specification was permitted to mix methodologies to create a favorable result to the former employee. If the Board used consistent calculation methods for both regular time and overtime (quarterly calculations, as Board precedent calls for), and the result

was that Hershey was entitled to back pay, then Lou's would have no reason to dispute the method of calculation. However, if the only reason the Board used a weekly calculation for overtime while using a quarterly calculation for regular time was to create a higher back pay number, then the Board must show why that is permissible. The Board has shown no such legal authority.

VIII. THE BOARD AND ALJ ERRED IN UPHOLDING THE COMPLIANCE SPECIFICATION WHICH DID NOT DEDUCT UNION DUES, UNIFORM FEES, AND UNEMPLOYMENT BENEFIT PAYMENTS FROM THE BACK PAY LIABILITY FIGURE.

The Board and the ALJ erred because they did not deduct union dues, uniform fees and unemployment benefit payments from the back pay liability figure. Failing to deduct union dues, uniform fees and unemployment benefits runs contrary to the stated purpose of back pay to put the employee in the same position he would have been but for his termination. (*See* Section III, *supra*, for a detailed discussion of the purpose of back pay.) To put Hershey in the same financial position, union dues, uniform fees and unemployment benefits must be deducted from Hershey's back pay.

Incredibly, the ALJ and the Board took issue with the fact that Lou's argued in favor of deducting uniform fees for the first time at the Hearing. (Doc. 21-4, App. 30.) Once again, the double standard comes into play that illustrates the one-sided nature of the Board proceedings. Just one month prior to the Hearing and

almost two years after issuing its original Compliance Specification, the Board itself claimed a completely new element of damages related to Hershey's 401(k) when it issued its Third Amended Compliance Specification. (GC 1(gg), App. 988.) The ALJ allowed this brand new element and ultimately included it in the ALJ's Supplemental Order and award of damages. (Doc. 21-4, App. 34.) However, only a month later when Lou's argued that Hershey's uniform fee should be deducted from his back pay, the ALJ barred the argument as untimely. In the interest of fairness and justice, if the uniform deduction was not allowed because it was untimely, then inclusion of purported 401(k) damages should also be barred.

Moreover, the Board was allowed to amend its Fourth Amended Compliance Specification during the Hearing – the Board was allowed to present, for the first time at the Hearing, its Amended Fourth Amended Compliance Specification. The ALJ allowed this, yet the ALJ and the Board denied the deduction of uniform fees based on the fact that it was argued for the first time at the Hearing.

IX. THE BOARD AND ALJ ERRED IN FINDING THAT THE COMPLIANCE SPECIFICATION REASONABLY CALCULATED INTERIM EXPENSES WITHOUT OFFSETTING INTERIM EARNINGS.

The Compliance Specification, which the ALJ and the Board upheld, did not properly calculate interim expenses because it did not offset interim earnings. Lou's spreadsheets (Doc. 21-4, App. 535-542, 543-550, and 551-558), which the

Board's Field Examiner Molenda admitted were correct, demonstrated that if the Board's numbers are adjusted by using the correct payroll information and using quarterly instead of weekly overtime calculations, the total Board number could be no more than $28,441.23. If the correct wage rate is included, the Board's total number could be no more than $27,034.87. If the appropriate comparable is used and the first quarter payroll is taken out (when Hershey would not have worked), the Board's total number could be no more than $7,766.90.

All those calculations assume that the Board's interim expenses number of $21,346 is correct. However, because Hershey earned more at his interim employment than he would have earned at Lou's, he is not entitled to mileage. The Board relied on *King Soopers, Inc.*, 364 NLRB 93 (August 24, 2016), and asserted that Hershey is entitled to mileage expenses despite Hershey's greater interim employment earnings. But *King Soopers* does not apply to this matter. Specifically, the *King Soopers* Board ruled as it did because, in that case, the Board's traditional approach resulted in less than "make-whole" relief for two reasons. First, discriminates who were unable to find interim employment did not receive any compensation for their search-for-work expenses. Secondly, discriminates who found jobs that paid less than their expenses did not receive full compensation for their search-for-work and interim employment expenses. *King Soopers, Inc.*, 364 NLRB 93 (August 24, 2016). *Neither* of those two situations

applies to Hershey. Hershey found employment almost immediately after his termination from Lou's. Therefore, he had no search-for-work expenses. (*See* Board's Schedule K of its Third Amended Compliance Specification, which supports this fact at GC 1(gg), Doc. 21-3, App. 1048.) Also, Hershey's interim employment did not pay less than his interim employment expenses (i.e., mileage expenses). As such, *King Soopers* is not applicable to Hershey's situation because Hershey found interim employment right away, and he made more money at his interim employment.

The ALJ, however, held that the *King Soopers* Board was not really ruling on the two specific issues that it raised and discussed in its decision, but rather, the ALJ asserted that the *King Soopers* Board was using the circumstances of that case as an example to effectuate a more broad, overall change in policy. That is not a proper interpretation of *King Soopers*. In fact, the *King Soopers* decision carved out two exceptions to the rule regarding certain expenses and whether to offset them to interim earnings or treat them as a separate element of the back pay award. Specifically, the *King Soopers* Board held that search-for-work expenses and interim employment expenses should be treated separately. The *King Soopers* Board specifically addressed those two issues and those two expenses – it was not designated as a "catch-all" for any and all expenses. The very first sentence of the Decision and Order specifies what the *King Soopers* Board was deciding:

> The primary issue in this case is whether the Board should modify the current make-whole remedy to require respondents to fully compensate discriminates for search-for-work expenses and expenses incurred in connection with interim employment.

King Soopers at p. 1 (emphasis added). While it is true that the *King Soopers* Board discussed other expenses that were also deemed exceptions and were awarded separately from back pay, none of which included mileage, the fact remains that the *King Soopers* Board only reached a decision on the search-for-work expenses and interim employment expenses, neither of which apply to the instant matter. Hershey was unemployed for approximately two weeks, and the evidence showed that he did not sustain any search-for-work or interim employment expenses; indeed, Hershey has never claimed such expenses. As such, *King Soopers* does not apply.

Furthermore, interim expenses (mileage) are non-existent because Hershey's travel to his interim employment was actually fewer miles than his travel to Lou's. All the Board's mileage calculations to and from Hershey's employment with Lou's had Hershey going from his residence in either Lake Orion or Clarkston to Lou's yard in Pontiac. However, beginning in November 2012 and continuing without interruption until the day of Hershey's termination on March 27, 2013, Hershey worked out of Lou's Flat Rock yard. As such, Hershey's commute (and

resulting mileage) to and from his employment with Lou's was much farther than his commute (and resulting mileage) to and from any of his interim employers.[9]

The undisputed testimony and evidence presented at the Hearing was that the calculation of hours Hershey worked, and the calculation of the pay he received for the hours worked, started when Hershey arrived at the Flat Rock yard. Hershey testified to this fact (TR. pp. 133-134, App. 858-859); Laming testified to this fact (TR. pp. 143-145, App. 868-870); and the documentary evidence admitted at the Hearing supports this fact (Time/Cost/Payroll Records, R9 and R10, App. 1791 and 1795). Indeed, Hershey so informed the State of Michigan when he filed his unemployment claim. (Unemployment Claim, R7, App. 1759.)

Both the Board and Hershey maintain that Hershey was required by a Pontiac supervisor to drive to the Pontiac yard first and then go to Flat Rock, and that Hershey was to be reimbursed by Lou's for this extra travel time. First, no law in the Sixth Circuit requires an employer to compensate or reimburse an employee for traveling from point A to point B to report to work or even for travel during employment. While many companies or employers do have mileage

[9] All the mileage calculations from Hershey's residences (Lake Orion and Clarkston) to his various interim employers (Calo & Sons, Kraken, Tia Marie, and Road Commission of Oakland County) were stipulated to by the parties, and those calculations are contained within the Amended Fourth Amended Compliance Specification, Schedule K of GC 1(qq), App. 1440). The mileage calculations for Hershey's trip to Petitioners' Flat Rock yard from both of his residences are set forth in R11 (App. 1805) and R12 (App. 1806).

reimbursement policies, it is not a requirement mandated under any Michigan law or statute. Indeed, the Internal Revenue Service allows an employee who has unreimbursed employment expenses (including mileage) to deduct them on the federal tax return. If the employer had to pay for those, there would be no need for a deduction.

It is undisputed that Hershey was not paid for any mileage until he arrived at Flat Rock. Since it was conceded that the mileage to/from Flat Rock was greater than the mileage to/from any of Hershey's interim employment, Hershey would be entitled to $0 in interim expenses under any scenario. (TR. pp. 98-99, App. 823-824.)

Second, Hershey's testimony about being "required" to report to Pontiac first was contradicted by Laming, who testified that there was no such requirement (TR. pp. 145-146, App. 870-871), and that it was not necessary because Lou's had runners whose only job was to take daily driver/job paperwork from Lou's other yards (Flat Rock, Milford, and Oxford) and deliver them to the main office in Pontiac for processing (TR. p. 153, App. 878.). As such, there was no reason for Hershey or any of the other Flat Rock workers to report to Pontiac first. In addition, Hershey testified that he was not required to punch in at the Pontiac yard, and the person who allegedly "required" that he report to Pontiac before going to

Flat Rock was usually not even at the Pontiac yard in the morning when Hershey and the others arrived. (TR. p. 132, App. 857.)

Third, even if Hershey was required to report to Pontiac with the promise of being paid to do so, it is undisputed that Hershey was not paid to drive to Pontiac first, and his hours and pay began when he arrived at Flat Rock. This fact is supported by testimony from Hershey and Laming, as well as documentary evidence. The supporting evidence presented at the Hearing included a Payroll Journal for Hershey's pay records and records specific to Hershey's pay during the week of January 21-25, 2013. (*See* R9 and R10, App. 1791 and 1795.) The records admitted into evidence showed that Hershey was paid for 45 hours that week; that Hershey was paid for 9 hours per day each of the five days; and that Lou's billed its customer for 8.5 of those 9 hours each day. Thus, these documents illustrate that Hershey was paid .5 hours per day to travel to the job site from the Flat Rock yard and then back to the Flat Rock yard from the job site (15 minutes each way). That was Hershey's time and compensation for his commute. The remaining 8.5 hours was Hershey's time on the job site. Hershey was not paid an additional two hours or more per day to go to Pontiac in the morning and drive back to Pontiac in the evening. At the time of Hershey's termination, he was being paid for his time starting in Flat Rock – the testimony and evidence on this point is undisputed. As such, mileage should be calculated using Flat Rock, not Pontiac.

Contradicting Hershey's testimony, Laming testified that Lou's never promised Hershey an 11-hour day, with nine hours designated for work and two hours for travel, as Hershey claimed. Instead, Laming testified that when Lou's was bidding the job, the customer talked about having an 11-hour day. (TR. p. 151, App. 876.) However, that discussion had nothing to do with making an 11-hour day so that Lou's could give employees two hours of drive time. The customer eventually decided that the job would entail an 8.5-hour work day. (*Id*.) As such, Lou's provided the drivers with 8.5 hours at the site and another .5 hours for travel.

Hershey's own written statement to the Michigan Unemployment Insurance Agency on April 1, 2013, just after his termination, notes that he was working out of the Flat Rock yard as of the day of his termination, that Lou's never once paid or reimbursed him for driving to/from any location other than Flat Rock, and that he was not paid or reimbursed for first going to Pontiac. (*See* R7, App. 1761.) These records, along with Hershey's own testimony, show that Lou's was not compensating Hershey for driving from Pontiac to Flat Rock. Hershey drove to Pontiac so that he could car pool with other Flat Rock drivers. (TR. p. 125, 136, App. 850, 861.)

Thus, Hershey's claim that he was promised and entitled to reimbursement or compensation for starting in Pontiac is contradicted by Laming's testimony, and

by the fact that neither Hershey's labor union nor the Wage and Hour Division of the Department of Labor pursued a claim on Hershey's behalf for any kind of mileage reimbursement.

Laming further testified that there was no reason to believe that Hershey would not have continued to work out of the Flat Rock location, even after the completion of the initial project for which he was transferred to Flat Rock. (TR. p. 154, App. 879.) Laming also testified that quad drivers from Lou's were working out of the Flat Rock location during the entire back pay period, so it was reasonable to conclude that Hershey would have remained there as well. (*Id*.)

To quantify what the elimination of interim expenses does with respect to the Board's claim, the $21,346 in interim expenses should be deducted from any final award.

X. THE BOARD AND ALJ ERRED IN UPHOLDING THE COMPLIANCE SPECIFICATION WHICH INCLUDED SPECIOUS 401(K) BENEFITS IN THE TOTAL BACK PAY LIABILITY.

The ALJ and the Board awarded Hershey $11,513 for a projected 401(k) account if Hershey had stayed employed at Lou's. While this requires speculation upon speculation, there is no basis to award any monies related to a 401(k). Specifically, the $11,513 is made up of $7,461 in projected 401(k) contributions from Hershey (Doc. 21-3, App. 983), $746 in employer contributions (Doc. 21-3,

App. 984), and a profit from the contributions $3,306 (Doc. 21-3, App. 984), leaving a fictitious 401(k) balance of $11,513.

First, it defies logic for Lou's to reimburse Hershey for $7,461 in 401(k) contributions that he did not make. To try to make it logical, the Board deducted $7,461 from Hershey's projected earnings at Lou's. However, all this did was negatively impact the net back pay calculation. Instead, in all of Lou's calculations, Lou's did not modify the projected pay by this $7,461, which was the correct methodology. So at a minimum, Lou's should not be ordered to give Hershey $7,461 that he never contributed to a 401(k).

Moreover, Hershey made more money at his interim employment and, therefore, could have invested in any vehicle he deemed appropriate. There is no basis to assume that he did nothing with his money and never contributed to a retirement vehicle at his interim employment.

Next, the income that the fictitious 401(k) would have made now piles speculation on top of speculation. Specifically, while the Board could have chosen a fund that Hershey actually could have invested in if he were still at Lou's, Molenda admitted that he used a fund that Hershey could not even have invested in if he stayed at Lou's. At a minimum, if the Board wanted this income, it should have picked a fund which Hershey could have invested in. There is no basis for awarding income for an investment that was impossible to make.

Given the above, there is no basis for awarding anything relating to a 401(k). That is perhaps the reason that the Board waited years after filing this claim until only a month before trial before providing this new, speculative, fictitious theory.[10] As such, the 401(k) damages of $4,053 should be deducted from any final award in this matter.

XI. CHARGING AN ADMINISTRATIVE LAW JUDGE WITH MAKING FINDINGS OF FACTS AND CONCLUSION OF LAW VIOLATES THE UNITED STATES CONSTITUTION AND DEPRIVED LOU'S OF AN ARTICLE 3 JUDGE OR JURY.

Under Article 3 of the U.S. Constitution, the judicial power of the United States is vested in the courts. As such, under the Constitution, judges and courts interpret the laws, while the legislature (Article 1) makes the laws and the executive branch (Article 2) enforces the laws. The NLRB's Administrative Law Judges, however, run contrary to this separation of powers.

The President of the United States, with Congressional consent, appoints the NLRB's Board members as well as General Counsel. The Board then appoints its ALJ's. As a result, the Board members, who make the agency laws, also interpret those laws via the ALJ's appointed by the Board. In essence, the NLRB makes the

[10] As noted previously, the ALJ's Supplemental Decision penalized Lou's for waiting until the Hearing to assert that Hershey's uniform fees should be deducted from back pay, yet the ALJ found it acceptable for the Board to wait until one month before the Hearing, and almost two years after the initial Compliance Specification was issued, to assert the purported 401(k) damages – a completely new element of damages.

laws, enforces the laws, and interprets the laws. This clearly runs afoul of the separation of powers, and it deprives Lou's of its right to have an Article 3 judge or jury decide the matters against it which were brought by the Board, prosecuted by the Board's General Counsel, and decided by the Board-appointed Administrative Law Judge.

Lou's set forth these arguments in its Exceptions to the ALJ's Supplemental Decision (Exceptions, App. 37), but the Board failed or refused to address the arguments when it issued its July 24, 2018 Supplemental Decision and Order. (Supplemental Decision and Order, App. 716.)

XII. THE BOARD AND ALJ ERRED IN UPHOLDING THE COMPLIANCE SPECIFICATION THAT CONTAINED MIXED METHODOLOGIES OF CALCULATIONS AND REPEATED ERRORS WHICH DENIED LOU'S OF ITS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The 5th Amendment to the United States Constitution prohibits the federal government from depriving a person of property without due process of law. (U.S. Const. amend. V.) Procedural due process is supposed to guarantee a fair legal process when the government tries to deprive one of a property or liberty interest, requiring that the government provide notice, an opportunity to be heard, and a decision by a neutral decision maker. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *see also Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988). Lou's was denied those basic rights. The Compliance Specification was

revised and amended repeatedly, and Lou's had to respond to and defend itself every time a change was made. One amendment was made just over one month before the scheduled Hearing. Lou's asked for more time to respond to the new element of damages regarding Hershey's 401(k) and additional time to prepare for the Hearing. But Lou's was given only three additional days to file its Answer to the Fourth Amended Compliance Specification (and address the new element of damages), and no additional time to prepare for the Hearing that would include the new element of damages.

Shockingly, when the Board gave Lou's only three additional days to file its Answer, it stated that there were "relatively minor amendments" to the Fourth Amended Compliance Specification. This statement, however, ignores the fact that only eleven days prior to filing its Fourth Amended Compliance Specification, the Board issued its Third Amended Compliance Specification which included the 401(k) claims. Those new claims resulted in $11,513.00 added to the Board's asserted damage claim for Hershey, a claim which is $49,817.00 in total. As such, the Board's new element of damages amounted to almost 25% of the total damage claim (back pay award), yet the Board described this increase as a "relatively minor amendment" which did not warrant any more than three additional days for Lou's to assess, investigate and defend before filing its Answer.

The Chief ALJ agreed with the Board and denied Lou's request to move the Hearing. In fact, the Chief ALJ stated in his Order that "[t]he time has long past [sic] for the issue of damages suffered by Mr. Hershey because of Respondent's discrimination to be resolved. For the reasons stated by the General Counsel in the opposition, the motion to postpone is denied." (Order, App. 21.) So the Board's over two years' worth of unsuccessful attempts to issue an accurate Compliance Specification was not a concern or consideration of the Chief ALJ, but Lou's request for a one-month extension to investigate a new claim that comprised almost 25% of the total damages was a concern which warranted a denial of Lou's request. That did not constitute a fair legal process, and it deprived Lou's of its right to due process.

Further, there was no neutral decision maker throughout this process. As set forth in Section XI, *supra*, everyone involved in the process, except Lou's, was in one way or another part of the National Labor Relations Board. Something as simple as looking at the documents generated throughout the compliance proceedings demonstrates this. The seven different versions of the Compliance Specification were all signed by the Regional Director of the National Labor Relations Board. The decision maker with respect to Lou's request for an extension of time in which to file its Answer to the Third (and ultimately Fourth) Amended Compliance Specification was also the Regional Director of the National

Labor Relations Board. Even the Order from the Chief ALJ denying Lou's request to reschedule the Hearing came from the National Labor Relations Board in Washington, D.C. The Board-appointed ALJ who presided over the Hearing and who issued the Supplemental Decision came from the National Labor Relations Board in Washington, D.C. There was no fair or impartial decision maker during this entire process. There were simply different arms of the same Board, separated merely by geography, making all the decisions and affirming each other's decisions. The process was anything but neutral.

Lou's was also denied equal protection under the law as provided by the 5th Amendment to the United States Constitution. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Lou's was treated differently than other employers who were found to have committed an unfair labor practice and ordered to pay back pay. Here, Hershey sustained no monetary damages. However, the Board and ALJ wanted to create and justify an award of monetary damages, so they calculated back pay unfairly – they mixed methodologies for regular time calculations (quarterly) and overtime calculations (weekly) so that they could come up with a damage number. They did so even though there was not a single case or even Board decision which supported doing so. All cases which make and discuss back pay calculations do so using quarterly calculations. The Board and ALJ did not cite to or rely upon a single case that mixed methodologies – that is because there is no such case.

However, to achieve the desired result, the Board and ALJ treated Lou's calculations differently than other Board calculations used in other compliance proceedings which stemmed from an unfair labor practice claim. Moreover, the Board and ALJ did not use the mixed methodologies because that was done in other cases. Rather, they did so solely for the purpose of punishing Lou's and awarding money damages to Hershey despite the fact that he suffered no money damages.

No governmental interest was served in treating Lou's unfairly. "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *See Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 94 (1972). Awarding back pay in a situation where the employee made more money at his interim employment than he would have made if he stayed with his former employer, while working fewer hours, is not an appropriate governmental interest that should be furthered. Spending two years' worth of taxpayer time and money pursuing an employer on behalf of an employee who suffered no damages is not an appropriate governmental interest that should be furthered. Acting in a manner that runs completely contrary to the clearly stated purpose of back pay is not an appropriate governmental interest that should be furthered.

From March 27, 2013 to August 22, 2016 (the back pay period), Hershey made more money with his interim employers than he would have made employed at Lou's, and he did so working 1,130 fewer hours. At the end of this process, this definitive fact should result in the conclusion that Hershey is not entitled to any back pay. For the government to spend over two years trying to find a way to avoid that rational, logical, and legally supported conclusion is a travesty.

XIII. CONCLUSION AND RELIEF REQUESTED

The purpose and intent of a back pay award is to make the employee whole. The Board and the ALJ, however, have ignored that purpose and intent, and instead, have manipulated the numbers, considerations, and methodologies used in its seven (7) compliance specifications to come up with some kind of award to justify the Board's use of two years' worth of taxpayer money to pursue a claim on behalf of someone who earned more money during his interim employment while working fewer hours.

Wherefore, for the reasons stated above, Petitioners Lou's Transport, Inc. and T.K.M.S., Inc. respectfully request that this Honorable Court:

A. Vacate the July 24, 2018 Supplemental Decision and Order of the Board;

B. Enter an Order declaring that Hershey is not entitled to any award of back pay, bonuses, interim expenses or 401(k) distribution.

Respectfully submitted,

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Dated: November 5, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,538 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on this the 5th day of November, 2018, pursuant to 6 Cir. R. 25, I caused the foregoing to be served electronically on the following through the ECF System:

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DESIGNATION OF RELEVANT DOCUMENTS

Description of Entry	Date Filed	Appendix Page Number
Certified List		1-4
Supplemental Decision and Order	07/24/18	5-13
Petition for Review	08/13/18	14
Cross-Application for Enforcement	08/29/18	15-16
Petitioners'/Cross-Respondents' Response to Respondent's/Cross-Petitioner's Application for Enforcement	09/06/18	17-19
Administrative Law Judge's Order Denying Motion to Reschedule Hearing and Granting Extension of Time to File Answer to September 8, 2017	08/17/17	20-21
Administrative Law Judge's Supplemental Decision and Order	01/25/18	22-35
Respondent's (Lou's Transport Inc., and T.K.M.S., Inc.) Exceptions to the Administrative Law Judge's Supplemental Decision	02/19/18	37-688
General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Supplemental Decision	04/02/18	691-715
Decision and Order (366 NLRB No. 140)	07/24/18	716-724
Supplemental Hearing Transcript	09/08/2017	725-899
Exhibit 1(oo) Respondent's Answer to Fourth Amended Compliance Specification		904-939

Exhibit 1(mm) Order Extending Time for Filing Answer, to Fourth Amended Compliance Specification		941
Exhibit 1(ll) Counsel for the General Counsel's Opposition to Respondent's Request to Reschedule Hearing and Request for Extension of Time to File an Answer		942-943
Exhibit 1(kk) Motion to Reschedule Hearing and Request for Extension of Time to File Answer		944-947
Exhibit 1(ii) Fourth Amended Compliance Specification		950-985
Exhibit 1(gg) Third Amended Compliance Specification		988-1048
Exhibit 1(x) Respondents' Answer to the Second Amended Compliance Specification		1062-1069
Exhibit 1(v) Second Amended Compliance Specification and Notice of Hearing,		1074-1142
Exhibit 1(q) Respondents' Answer to Amended Compliance, Specification and Request for Production of Documents		1147-1153
Exhibit 1(o) Amended Compliance Specification and Notice of Hearing		1156-1221
Exhibit 1(j) Respondent's Answer to the National Labor Relations Board's Compliance Specification and Request for Documentation		1276-1284
Exhibit 1(f) Compliance Specification and Notice of Hearing		1294-1311
Exhibit 1(qq) Fourth Amended Compliance Specification and Notice of Hearing		1381-1440

Exhibit 6 Agreement Summary Sheet		1450-1496
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Exhibit 3 2013 W-2 Michael P. Hershey		1672-1676
Exhibit 4 2013 W-2 Michael P. Hershey		1677-1726
Exhibit 5 Request for Documents Pertaining to Michael Hershey from Oakland County Road Commission		1727-1751
Exhibit 6 Tia Marie Trucking Payroll Journal for Michael Hershey		1752-1758
Exhibit 7 Request for Information Relative to Possible Ineligibility or Disqualification		1759-1779
Exhibit 9 Payroll Journal Michael Hershey		1791-1794
Exhibit 10 Trucking Information		1795-1804
Exhibit 11 Trip Information		1805
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